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ABSTRACT

This articles examines litigation which has been generated as a result of fiscal cut-backs at institutions of higher education and looks at the rights and obligations of college and university administrators and students as well as possible future trends. A first section details the effects of budget reductions at California state institutions where the recession has prompted deep cuts in state allocations for education. A following section describes the situation at Syracuse University (New York) and its plans to cut spending over the coming years by freezing salaries and eliminating major academic programs. The paper goes on to describe the types of legal questions that such actions are raising particularly whether students and or universities may assert standard contract theories such as impossibility of performance, express and implied contract, foreseeability, and damage. Specific cases are reviewed including "Beukas versus Fairleigh Dickinson University," "Napolitano versus Princeton University Board of Trustees," AASE versus State of South Dakota Board of Regents," "Eden versus the Board of Trustees of the State University of New York," and "Peretti versus the State of Montana". A conclusion looks at the possible future impact of decreased support for higher education. Included are 43 references. (JB)

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AN ECONOMIC RECESSION:

STATE BUDGET CUTS AND THEIR EFFECT ON COLLEGES AND UNIVERSITIES

BY

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Across the nation, colleges and universities are facing unprecedented fiscal pressures from the stagnant economy and recession. Public institutions are especially hard hit because of their traditional reliance on state legislatures for a share of their funding sources. Many colleges and universities that once enjoyed prosperity, growth, low-cost and high-quality are faced with having to do more with less.

For example, at Syracuse University which flourished in the 1980's, opening ten new buildings, upgrading academic programs, now in response to declining enrollments, has frozen salaries for all employees and contemplates elimination of academic programs. At New Jersey's Fairleigh Dickinson University, a $6,200,000.00 deficit in the 1988-89 academic year led to the closing of the University School of Dentistry, one of two in the state.

This article examines this national epidemic affecting higher education, the litigation which has been generated as a result of fiscal belt-tightening, the rights and obligations of college and university administrators and students, and future trends.

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CALIFORNIA

At San Diego State University 550 part-time instructors have been dismissed and 662 classes cancelled.[1] More than 1,300 students could not register for their requested courses when the semester began.

At California State University at Northridge and Los Angeles, janitorial services have been cut back so sharply that students and professors in the Department of Communicative Disorders regularly pick up brooms and mops to clean the clinic and therapy rooms.[2]

Many professors are typing exams in smaller type to save paper and using tests that can be electronically graded instead of essays to save time. Budgets for phone calls, copier paper and clerical help have been reduced sharply.[3]

At the Center for Studies and Higher Education at the University of California at Berkeley a machine takes phone calls since the Center can longer afford a receptionist. At San Francisco State University, students sit on the floor in many classes.[4]

None of these troubles were foreseen as recently as 1987, when the higher education master plan for the State of California was reviewed by two special commissions, one appointed by Governor Deukmejian, then the Republican Governor, and the other by the Democratic-controlled Legislature.[5] Both commissions assumed the state would continue - indeed greatly expand - public higher education.[6]

Saying it was determined at all costs to preserve quality, it raised student fees by 40%, to $2,274.00 a year, froze all salaries, planned to cut enrollment by 5,500 over the next few years, and gave early retirement to nearly 3,500 employees, including 672 faculty members.[7]

Harder hit, with a 3.2% budget cut, the California State system raised fees by 20%, to $936.00 a year, cut more than 4,000 classes, laid off more than 1,000 faculty members and did not rehire more than 2,000 part-time teachers.[8] Eight of the 20 campuses have closed admissions for the Spring 1992 semester.[9]

These cuts have produced rising student anger, particularly at San Diego State, where enrollment dropped by 1,500 students, or 4% in the 1991 semester because many students could not enroll for classes. The cuts have proved devastating for many of the 32,951 remaining students, many of whom work and who face spending another semester or two in college because general education classes required for graduation were full to capacity.[10]

California's recent budget crisis has only worsened this situation throughout the state.

SYRACUSE UNIVERSITY

Syracuse University, which flourished in the 1980's, is taking a critical look at the University's strengths and weaknesses. This reexamination, in response to falling enrollment, has already produced a budget cut that includes a salary freeze for all employees. It has inspired studies that could lead to the

elimination of major academic programs over the next several years.[11]

In the past two years, the University has lost about 1,700 undergraduates, the primary cause of a 9.5 million dollar budget deficit for fiscal year 1990-92. Undergraduate enrollment, now about 11,500 students is expected to drop another 1,200 to 1,900 students over the next several years, translating into an additional budget deficit of 28.5 million in the next 3 years.[12] In February 1991, restructuring at the University could eliminate 500 to 600 people from the University's 4,000-member workforce. An advisory group of administrators and faculty members has already suggested the elimination of some academic programs and the consolidation of some of the University's 14 schools and colleges.[13]

At the University of Maryland budget cuts have resulted in layoffs, furloughs, school closing and program reduction.

Even at prestigious Ivy League institutions, Yale University's former President, Benno C. Schmidt, Jr., announced cuts of 5 to 10% for academic and administrative departments in 1991[14], and Stanford University officials announced budget reductions ranging from 7 to 12% in its seven schools.[15]

LEGAL ASPECTS OF BUDGET CUTS

Although some fiscal restraint is long overdue and necessary, the fiscal crisis in higher education is real. Colleges and universities throughout the United States--large research

universities and small liberal arts colleges--are experiencing the ill effects of reduced state aid and limited state and federal funding, resulting in furloughs, layoffs and school closings. These events raise substantial legal questions, such as whether the student bulletin and/or college and university publications establish a sufficient contractual relationship between these parties such that the university may not close a school in response to extreme fiscal constraints. Some of these questions are whether students and/or universities may assert standard contact theories, such as impossibility of performance, express and implied contract, foreseeability and damages, and what is the role of courts in resolving these issues.

In a 1991 decision, Beukas v. Fairleigh Dickinson University,[16] the New Jersey Superior Court Law Division, ruled that the plaintiffs who were students at Fairleigh Dickinson University School of Dentistry could not recover damages under an express contract theory for the University's decision to close the dental institution because of lack of state funding.

Here, Fairleigh Dickinson University, (FDU) operated a private college of dental medicine and published an annual graduate studies bulletin detailing various graduate programs. The bulletin contained a reservation of right, giving the university the right to, without limitation, eliminate colleges and schools, as well as academic programs "whenever in its sole judgement it is deemed desirable to do so."[17]

After completing the application process, the students were

notified by the University that they had been accepted into the general college for a course of study leading to a D.M.D. degree. The students accepted the university's offer, rejected alternate career options, notified the university that they accepted the offer, and paid tuition for the coming semester. No formal written contract was executed. The course of study was beginning in September 1986, 1987 and 1988. In January 1989, the university's president learned from the chancellor of higher education that the governor's budget had appropriated 25% less money for the dental college for the 1989-90 school year than the college had received in 1988-89.[18]

Several months later, the university's president met with then Governor Thomas H. Kean, who informed him that the dental college would receive no state aid after the 1989-90 school year because the governor had made a policy determination that it could no longer fund both the University of Medicine and Dentistry of New Jersey and the College of Dental Medicine of Fairleigh Dickinson University. State aid constituted 38.1% of the dental college's total budget for the 1988-89 school year. Due to this loss of aid, FDU incurred a deficit of approximately $6,200,000 for the 1988-89 academic year. The university did not have funds available to make up for the loss of state aid to the dental college.[19]

As a result, several days after the initial meeting with the governor, the university president recommended that:

1) The process for consultation with faculty over closing of the dental college be initiated;

2) The acceptance of a freshman class for the dental class for the 1989-90 school year be suspended;

3) The search for a new dean for the dental college be suspended;

4) The dental college be kept open so that certain students currently enrolled in their junior year could complete their education during the 1989-90 school year; and

5) The dental college close permanently in June 1990.

Meetings between university officials and students to inform them of the governor's action and the president's recommendations were held in March and throughout April. In June, the Board of Trustees approved a resolution closing the dental college at the end of 1989-90 school year.[20]

In the spring of 1989, the University appointed a dental college professor to coordinate and effectuate transfers of first, second and third year students. He met with students to inform them of their transfer options and provide information. University officials reached agreements with various institutions, including the University of Medicine and Dentistry of New Jersey, Columbia University School of Dentistry, New York University School of Dentistry, Tufts University School of Dentistry, and Temple University School of Dentistry to accept FDU's dental students as transfer students during either the 1989-90 or 1990-91 school year. The students were offered two transfer choices:

1) they could transfer immediately for the 1989-90 school year, either to the five schools previously mentioned or

other accredited dental colleges; or

2) the dental college students could remain at FDU for the 1989-90 school year and then transfer to one of the five schools or any other accredited dental college. If the students chose the second option, they would receive a tuition subsidy at the dental college of their choice.[21] Additionally, dental students were offered clinical and academic instructions so as to facilitate their transfer to other dental schools. Finally, FDU coordinated with the state dental accreditation society to insure that the dental college retained its accreditation for the 1989-90 academic year.[22]

In this case, the plaintiff-students seek damages from defendant-Fairleigh Dickinson University based on an alleged breach of contract. The plaintiff alleged as their basis for recovery, that a contract based on the annual bulletin issued by the University, including the dental college, as well as other publications of the university which they assert are the controlling documents in their contractual relationship.[23] They argue that when they paid the first year's tuition, a complete and binding contract arose for the entire educational program culminating in a D.M.D. degree on the terms set out in the bulletin. Plaintiffs further claimed that the defendant breached their contract with plaintiffs and that, notwithstanding any claim of financial exigency, defendants performance was not excused under the contract doctrine of impossibility of performance. Therefore,

plaintiffs argued that they are entitled to an award of damages.

Fairleigh Dickinson maintained that the doctrine of judicial deference to university autonomy in academic decisions as set forth in Napolitano v. Princeton University Board of Trustees,[24] requires the court to decline to interfere with defendants administrative decision to close the dental college.

Alternately, defendants argue that even if the doctrine of judicial deference does not conclusively dispose of the issue, plaintiffs have no contractual relationship with defendants and therefore, no cause of action exists upon which an award of damages could be based. However, without conceding the existence of a contractual relationship, defendants said that even if the court finds a valid contract to exist based on the bulletins and other documents, defendants had a right to close the dental college under the specific terms of their "contract" as set forth in the Graduate Studies Bulletin. [25] The bulletin reserved the university is right in its sole judgement to make changes of any nature in the university's academic program, including the elimination of any college, provided adequate notice was given to the students. Accordingly, defendants argued that if there is a contract between defendants and plaintiffs, then the provision is enforceable and, therefore, plaintiff may not recover. Moreover, they contend that in activating the reservation of rights clause in the bulletin, they did so fairly and in good faith.[26] The students counter that such reservation of rights clause is unconscionable and constitutes an unenforceable adhesion contract.[27]

Finally, defendants contend that if they are considered to be in breach of any contractual obligation to plaintiffs, the alleged breach should be excused by the doctrine of impracticability of performance. [28]

The issue before the New Jersey Superior Court is whether in determining to permanently close the dental college, Fairleigh Dickinson University infringed upon any legal rights of plaintiffs-students which would entitle them to redress their grievances through an award of damages.

The court discussed the role of a private institution vis-a-vis university students and discussed the appropriate standard of review that should be used to resolve university-student conflicts involving an administrative decision to terminate an academic or professional program, on the grounds of fiscal exigency. According to the court's review, at least one jurisdiction appeared to have applied that principle as the basis for refusing to interfere with a university's autonomy where the relief sought was equitable in nature.[29]

In re Antioch University, "executive prerogative" was acknowledged but rejected by the District of Columbia Court of Appeals due to arbitrariness in the administration's decision to cancel a new school for podiatric medicine because of financial problems after students had already been accepted. The court applied principles of estoppel.[30]

A related case, AASE v. State of South Dakota Board of Regents,[31] was brought to test the legality of closing the

University of South Dakota at Springfield (USD/S) and the effect of such closing on students. The plaintiffs-students attending in academic year 1983-1984 sued the South Dakota Board of Regents, individually and in their capacity as Regents. The trial court granted the defendants' motion for summary judgment and the plaintiff appealed. The Supreme Court of South Dakota affirmed the trial court's motion.[32]

In this case, the South Dakota legislature enacted legislation which was signed into law which transferred the control of USD/S grounds and facilities from the Board of Regents to the Board of Charities and Corrections and converted the school into a minimum security prison. The new law permitted the students to finish the 1983-84 academic year at the Springfield campus and required the Board of Regents and the Board of Vocational Education to take steps to give students an opportunity to complete their course of study in South Dakota through articulation agreements and by including a baccalaureate program of vocational education within one of the institutions under their control.[33]

The students filed a complaint charging:

1) Breach of contract;
2) A claim for injunctive relief to prevent closure of the institution;
3) A declaration that the new law was unconstitutional;
4) A claim for violation of civil rights under 42 USC Section 1993;
5) A claim for invasion of individual constitutional rights;

and

6) A claim under the South Dakota deceptive trade practices of Consumer Protection Act.[34]

The South Dakota Supreme Court agreed with the trial court that based on the record and as a matter of law, the students had no enforceable contract rights against the Regents. As a general principle, the relationship between a university and a student is contractual by nature. However, the only contract formed between the student and the university is for the term in which the tuition is paid. In this case, the students were permitted to complete the academic year at the Springfield campus. No rights of the students were impaired. The students did not develop any other contract rights with the Board of Regents.[35]

In dismissing the complaint, the South Dakota court ruled that the Board of Regents gave the students an opportunity to complete their courses of study in South Dakota as required by the new law; that the students were not entitled to mandatory injunction against the closure of the Springfield campus; that they were not entitled to bring suit under 42 USC Section 1983; that the Regent's individual capacity enjoyed a qualified or good faith immunity which applies to claims made under this action; and that no constitutional rights of the students were invaded and no violation of South Dakota law occurred.

In Eden v. the Board of Trustees of the State University of New York, [36] the State University of New York at Stony Brook, Long Island sent literature to colleges and students throughout the

United States announcing that it was establishing a new school of podiatric medicine in the Health Science Center in 1975 leading to a degree of Doctor of Podiatric Medicine after a four-year course, with an initial class of 24 students. The literature solicited applications from students. Several hundred students applied. Twenty-four applicants were accepted in May of 1975. All of them were notified by the dean that "all contingencies as to their acceptance by the schools were removed.[37] However, in June 1975 the Division of the Budget of the State of New York informed the State University of New York (SUNY) that the scheduled opening of the school had been deferred. Accordingly, the dean notified these accepted students that they had to suspend their plans to matriculate at Stony Brook in the coming academic year.[38]

The students sued SUNY to compel them to operate the program and to permit them to attend as matriculated students. The trial court dismissed the petition. The petitioners appealed from the court's judgment. The New York Supreme Court, Appellate Division ruled that a valid contract was formed when applications for matriculation to the new school of podiatric medicine were accepted by the state university. Also, the state's fiscal crisis did not furnish a rational basis for the state's determination not to proceed with plans for a new school of podiatric medicine at the Health Science Center at the State University of New York where the decision to defer establishing the school would save no money, but would rather result in a loss of grants. The state was estopped from asserting lack of capacity of the state university officials

to contract for admission of students to the planned school of podiatric medicine where the students had made their plans and taken action in reliance on acceptance of their applications, including declining matriculation at other schools of podiatry. However, the court cautioned that the judicial branch must exercise restraint in questioning executive prerogative, especially where budgetary and fiscal problems may require elimination or curtailment of state-provided services. [39]

In Peretti v. the State of Montana,[40] students were successful in a lawsuit brought against the Board of Public Education. Here, students whose course of study in aviation technology offered by the Montana State Vocational Education Center, was interrupted due to budget cuts by the state legislature brought a claim against the State of Montana. In this case, the Vocational Education Center financed by the State of Montana described an aviation technology course leading to a private pilot's license, giving details as to the course offered which extended over six quarters. Upon completion of the training of six quarters, students would receive a diploma.[41]

The United States District Court for the District of Montana ruled that as between the state and the plaintiffs, there was an implied contract that the plaintiffs, who were enrolled in the aviation technology course, would be given an opportunity to complete the training period of six quarters and receive a diploma evidencing such completion. The right arising from an implied contract is within the Fourteenth Amendment of the U.S.

Constitution, the court said. Because the suit alleged violation of a right protected under the constitution and because the amount in controversy was alleged to be in excess of the jurisdictional amount, there was federal question jurisdiction.

CONCLUSION:

THE FISCAL CRISIS IN HIGHER EDUCATION: A NATIONAL PERSPECTIVE

Throughout the United States, colleges and universities are experiencing unprecedented demands of the recession which has forced growing number of parents to reconsider plans to send their children to college, and has affected the smallest community college to the largest research and Ivy League institutions. For example, Yale University has a $8.8 million dollar budget shortfall. Columbia University is facing a deficit of at least $15 million dollars for 1993 and Harvard University, which usually does not release budget figures until months after its fiscal year ends, has disclosed it finished the last academic year with a deficit of $41.9 million, the first shortfall in Cambridge since 1974.[42]

Job layoffs, especially in middle income and professional households, and fear about how far the economy will slide and whether there will be a recovery are the main forces behind the apprehensiveness of many college officials.[43] The economy slumped at a time when higher education was already struggling with two trends effecting recruitment: resistance to rising fees for tuition, room and board, now more than $20,000 yearly at many private colleges; and many demographic shifts that have led to a

smaller population of 18 year olds. As a result, colleges are selecting 1994 Fall freshmen from a smaller pool of graduating high school seniors and from an even smaller number who can afford the costs.

College leaders across the United States recognize that there are many valid, competing priorities for state and federal funding. Legislators must make the hard decisions regarding competing priorities. College leaders are focused on the challenge of reducing cost without reducing quality, while at the same time meeting goals of access and affordability. To preserve quality, services may have to be offered to fewer students. Restoring predictability to state funding of higher education is of the utmost importance. State funding of obligations, student aid, and state support for maximum campus administrative flexibility, are among the building blocks of predictability. No state can achieve fully its growth and opportunity agenda without support for its colleges and universities.

Over the past several years, nationally, the cost of higher education has outpaced the consumer price (inflation) index - thus, even level funding from one year to the next results in a considerable loss of buying power. Higher education today is not only labor intensive, but must be technology intensive as well, given the changing workplace and marketplace. This drives costs upward.

Many colleges and universities throughout the United States

are freezing positions, deferring maintenance, limiting enrollments, spending limited reserves and increasing tuition. None of these are envisioned as long-term solutions. Many can not be repeated year after year without dire consequences.

Educational opportunities have long been recognized as the building block for good citizenship. An educated workforce translates into a generation of ideas and technologies to help meet the challenges facing the country, the environment and the economy. The erosion of federal and state support for higher education will have consequences reaching well beyond the present.

Colleges and universities must seek to maximize the efficiency and effectiveness of their operations and services through comprehensive institutional analysis and strategic planning which includes special partnerships with the private sector for fund raising and development. However, effectiveness can not produce excellence in the absence of adequate and reliable funding. Economic recession can and does effect state and federal funding levels. Funding of higher education, even in recessionary periods, is a good investment since these institutions can leverage state and federal resources into gains for the country and the future.

FOOTNOTES

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2. Id. at 28, Col. 1.

3. Id.

4. Id.

5. Id.

6. Id.

7. Id. at Col. 2.

8. Id.

9. Id.

10. Id.

11. Samuel Weiss, The Hard Times Roll on Syracuse Campus, N.Y. Times Oct. 4, 1991, at A 1, Col 1.

12. Id.

13. Id.

14. Supra note 2 generally.

15. Id.

16. Beukas v. Bd of Trustees of Fairleigh Dickinson University, No. L-40606-89 (App. Div. March 17, 1992).

17. Id. at 2.

18. Id. at 4-5.

19. Id.

20. Id. at 6.

21. Id. at 6-7.

22. Id.

23. Id. at 7.

24. Napolitano v. Princeton University Trustees, 186 N.J. Super. 548 (App. Div. 1982).

25. Supra note 19 at 9.

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27. Id.

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30. In re Antioch University, 418 A. 2d 105, 113 (D.C. App. 1980)

31. AASE v State of So. Dakota, 400 NW 2nd 269 (S.D. 1987)

32. Id. at 270

33. Id.

34. Id.

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